STATE OF MICHIGAN
IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

KENNETH JAY HOULIHAN,

Defendant-Appellant.

_____/

Michigan Supreme Court No. 128340

Court of Appeals No. 256534

Kent County Circuit Court
No. 01-002731-FC

ATTORNEY GENERAL'S AMICUS BRIEF IN SUPPORT OF THE PEOPLE

Michael A. Cox
Attorney General

Thomas L. Casey (P24215)
Solicitor General
Counsel of Record

Eric Restuccia (P49550)
Assistant Attorney General
Department of Attorney General
Criminal Appellate Division
P.O. Box 30217
Lansing, MI 48909
Telephone: (517) 373-4875

Dated: November 1, 2005

TABLE OF CONTENTS

INDEX OF AUTHORITIES

Statutes

Other Authorities

Rules

STATEMENT OF QUESTION INVOLVED

I. **The United States Supreme Court has held that where it establishes a new rule of law that imposes a new obligation on states, that rule only applies retroactively to convictions that are final where the rule is implicit in ordered liberty. The rule from *Halbert v Michigan* requires that the State of Michigan appoint counsel to an indigent defendant, who pled guilty, to enable the defendant to file an application for leave to the Michigan Court of Appeals where there is no appeal of right. The prior precedent of the United States Supreme Court was clear that (1) an indigent defendant had a right to appointed counsel in bringing a first-tier appeal of right, but that (2) an indigent defendant did not have a right to appointed counsel to bring a second-tier application for leave to the next appellate level. Did the U.S. Supreme Court in *Halbert* announce a new rule, and is this right implicit in ordered liberty?**

The People answer: Yes, and no.

Defendant will answer: No, and yes.

The Attorney General Amicus answers: Yes, and no.

STATEMENT OF JUDGMENT APPEALED FROM, GROUNDS, AND RELIEF SOUGHT

Consistent with MCR 7.306(D), the Attorney General is filing a motion to file an amicus curiae brief in support of the Kent County Prosecutor's Office. The Attorney General defended the constitutionality of the underlying statute at issue, MCL 770.3a, in the United States Supreme Court in *Halbert v Michigan*[1] regarding the circumstances in which the State of Michigan was obliged to appoint counsel to indigent defendants who plead guilty. As this case arises from an appeal from a denial of a motion for relief for judgment under MCR 6.500 *et seq*, the Attorney General has relied primarily on federal habeas corpus cases.

[1] *Halbert v Michigan,* 545 US ___; 161 L Ed 2d 1109; 125 S Ct 2514 (2005).

STATEMENT OF PROCEEDINGS AND FACTS

The Attorney General agrees with the people's statement of facts.

ARGUMENT

I. The United States Supreme Court has held that where it establishes a new rule of law that imposes a new obligation on states, that rule only applies retroactively to convictions that are final where the rule is implicit in ordered liberty. The rule from *Halbert v Michigan* requires that the State of Michigan appoint counsel to an indigent defendant, who pled guilty, to enable the defendant to file an application for leave to the Michigan Court of Appeals where there is no appeal of right. The prior precedent of the United States Supreme Court was clear that (1) an indigent defendant had a right to appointed counsel in bringing a first-tier appeal of right, but that (2) an indigent defendant did not have a right to appointed counsel to bring a second-tier application for leave to the next appellate level. In *Halbert,* the U.S. Supreme Court announced a new rule applying the right to the first-tier application for leave, and this right is not implicit in ordered liberty. Consequently, the rule does not apply retroactively.

A. Standard of Review

The question whether a decision must be applied retroactively is a question of law that this Court reviews de novo.[2]

B. Analysis

Defendant's application for leave requires the resolution of two questions under *Teague v Lane*[3]: (1) whether the decision in *Halbert* announced a new rule of law regarding the obligation of a State to appoint an indigent defendant counsel and (2) whether the right identified in *Halbert* is implicit in the concept of ordered liberty. Because the *Halbert* decision resolved a previously unanswered question, it constitutes a new rule. It extends the obligation to appoint an indigent counsel where a defendant files a first appeal of right to the circumstance in which a defendant (who has pled guilty) brings an application for leave and the appellate court is not obligated to grant review or to correct any possible error. The result of the majority's decision in *Halbert* was subject to reasonable disagreement because the prior precedent did not squarely address this circumstance. Moreover, this new rule is not implicit in ordered liberty because it does not

[2] See, e.g., *People v Sexton,* 458 Mich 43, 61-67; 580 NW2d 404 (1998).
[3] *Teague v Lane*, 489 US 288; 103 L Ed 2d 334; 109 S Ct 1060 (1989).

implicate the accuracy of criminal proceedings. In the same way that the United States Supreme Court has recognized that the right to appeal is not central to the determination of innocence or guilt, the ability to have an attorney to bring an application where there is no right to appeal also does not implicate the accuracy of the criminal proceedings. This Court should not apply this rule retroactively, but limit its application to cases pending on direct review. When defendant has requested the appointment of ~~cousel~~ counsel.

As an initial matter, new rules always have retroactive application to criminal cases pending on direct review.[4] The United States Supreme Court has seldom held, however, that new rules have retroactive application to criminal cases when a defendant is raising a collateral attack on the conviction under *Teague*.[5]

Under *Teague,* the United States Supreme Court articulated the standard for evaluating whether a constitutional rule of criminal procedure applies to a case, such as this one, where the defendant raises an issue on collateral review.[6] The analysis requires the folllowing steps.

As a threshold question, this Court must determine whether the defendant's conviction had become final before the rule was announced.[7] There is no dispute here that defendant pled guilty and that his applications for leave on direct review were denied before the *Halbert* case was decided.

Then, this Court must examine the "legal landscape" that existed at the time and determine whether the rule is actually "new."[8] Finally, if the rule is new, this Court must

---

[4] *Griffith v Kentucky*, 479 US 314, 320-328; 93 L Ed 2d 649; 107 S Ct 708 (1987).
[5] *Brecht v Abrahamson*, 507 US 619, 634; 123 L Ed 2d 353; 113 S Ct 1710 (1993).
[6] *Beard v Banks*, 542 US 406; 124 S Ct 2504, 2510; 159 L Ed 2d 494, 502 (2004), citing *Lambrix v Singletary,* 520 US 518, 527, 137 L Ed 2d 771, 117 S Ct 1517 (1997).
[7] *Beard,* 124 S Ct at 2510.
[8] *Beard*, 124 S Ct at 2510, citing *Graham v Collins*, 506 US 461, 468; 122 L Ed 2d 260; 113 S Ct 892 (1993).

consider whether the case falls within either of the two exceptions to retroactivity, only one of which is relevant for this application – whether the rule is one of a small core of rules of procedure that are implicit in the concept of ordered liberty.[9] The Attorney General shall address the two questions in order:

1. **The *Halbert* Court announced a new rule in holding that a state was obligated to appoint an attorney to an indigent defendant who pled guilty to assist that defendant to bring an application for leave as a first-tier appeal (where the appellate court has no obligation to grant review correct an error).**

In examining the legal landscape that existed before the *Halbert* decision, there were two controlling decisions regarding a State's obligation to appoint counsel to indigent defendants on appeal: *Douglas*[10] and *Ross*[11]. In *Douglas,* the United States Supreme Court held that a State must appoint counsel for a first appeal brought as a matter of right.[12] The Court expressly noted that the decision did not address a second, discretionary appeal after an appellate court had already examined the first appeal of right[13]:

> We are not here concerned with problems that might arise from the denial of counsel for the preparation of a petition for discretionary or mandatory review beyond the stage in the appellate process at which the claims have once been presented by a lawyer and passed upon by an appellate court. *We are dealing only with the first appeal, granted as a matter of right to rich and poor alike, from a criminal conviction.*
>
> We need not now decide whether California would have to provide counsel for an indigent seeking a discretionary hearing from the California Supreme Court after

---

[9] *Beard*, 124 S Ct at 2510, 2513, citing (at 2510) *Lambrix*, 520 US at 527, and citing (at 2513) *O'Dell v Netherland*, 521 US 151, 157; 138 L Ed 2d 351; 117 S Ct 1969 (1997).
[10] *Douglas v California*, 372 US 353; 9 L Ed 2d 811; 83 S Ct 814 (1963).
[11] *Ross v Moffitt*, 417 US 600, 41 L Ed 2d 341; 94 S Ct 2437 (1974).
[12] *Douglas,* 372 US at 357 ("There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent, already burdened by a preliminary determination that his case is without merit, is forced to shift for himself").
[13] *Douglas,* 372 US at 356 (emphasis added; California statutory cites omitted; and paragraph break added).

> the District Court of Appeal had sustained his conviction, or whether counsel must be appointed for an indigent seeking review of an appellate affirmance of his conviction in this Court by appeal as of right or by petition for a writ of certiorari which lies within the Court's discretion.

The question of the second-tier, discretionary appeal was left for another day.

Following this 1963 decision, the United States in *Ross* then resolved the unanswered question about a second-tier, discretionary appeal. The Court held that there is no right to appointed counsel in bringing an application for leave to the next appellate court, the North Carolina Supreme Court in that case, after the first appellate court affirmed the defendant's conviction.[14] In *Ross,* the Court framed the question as one in which the defendant was asking the Court to "extend" this right to circumstances outside of the first appeal as of right[15]:

> We are asked in this case to decide whether *Douglas v California*, 372 US 353 (1963), which requires appointment of counsel for indigent state defendants on their first appeal as of right, should be *extended* to require counsel for discretionary state appeals and for applications for review in this Court.

In answering this question that the right did not extend to this second-tier application, the Court provided a definition of "discretionary" (that would be relevant for the issue in *Halbert*) as an appeal for which there is no right to have an error corrected[16]:

> We are fortified in this conclusion [that there the defendant had meaningful access to the next appellate level] by our understanding of the function served by discretionary review in the North Carolina Supreme Court. The critical issue in that court, as we perceive it, is not whether there has been "a correct adjudication of guilt" in every individual case, but rather whether "the subject matter of the appeal has significant public interest," whether "the cause involves legal principles of major significance to the jurisprudence of the State," or whether the decision below is in probable conflict with a decision of the Supreme Court. *The*

---

[14] *Ross,* 417 US at 616 ("The duty of the State under our cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process. We think respondent was given that opportunity under the existing North Carolina system").

[15] *Ross,* 417 US at 602.

[16] *Ross*, 417 US at 616 (citations omitted).

> *[North Carolina] Supreme Court may deny certiorari even though it believes that the decision of the Court of Appeals was incorrect*, since a decision which appears incorrect may nevertheless fail to satisfy any of the criteria discussed above.

The Court concluded that an indigent would have "meaningful access" to the North Carolina Supreme Court because that defendant would have (1) "a transcript or other record of trial proceedings," (2) "a brief on his behalf in the Court of Appeals setting forth his claims of error," and (3) "an opinion by the Court of Appeals disposing of his case."[17] These materials would then provide the North Carolina Supreme Court an adequate basis on which to grant or deny review.[18]

The Michigan system of appeals from guilty pleas was not squarely resolved by either previous holding, because it presented a hybrid question. A defendant who pleads guilty in Michigan does not have a right to an appeal. Rather, such a defendant may only bring an application for leave.[19] Significantly, as this Court noted in *People v Bulger,* there is no right to have an error corrected on appeal because any review is discretionary.[20] In this respect, the appeal is like that of *Ross.* The appeal, however, is a first-tier appeal and there has been no other appellate review. In this respect, the appeal is like that of *Douglas.* The question raised in *Bulger,* and later by *Halbert*, was whether *Douglas* or *Ross* governed the resolution of the Michigan case.

---

[17] *Ross,* 417 US at 615.
[18] *Ross,* 417 US at 615.
[19] See Mich. Const. 1963, art I, §20 (an accused is entitled "to have an appeal as a matter of right, except as provided by law an appeal by an accused who pleads guilty or nolo contendere shall be by leave of the court").
[20] *People v Bulger,* 462 Mich 495, 499; 614 NW2d 103 (2000) ("Under our federalist scheme of government, Michigan remains free to decide the conditions under which appellate counsel will be provided where our state constitution commands that the mechanism of appellate review is discretionary").

The United States Supreme Court in *Halbert* recognized that these two cases (*Douglas* and *Ross*) provided the proper framework of analysis to examine the Michigan appellate system[21]:

> Petitioner Halbert's case is framed by two prior decisions of this Court concerning state-funded appellate counsel, *Douglas* and *Ross*. The question before us is essentially one of classification: With which of those decisions should the instant case be aligned?

In fact, the majority decision in *Halbert* noted that the dissent in *Halbert* had admitted the same point that Michigan's system bore similarities to both *Douglas* and *Ross*[22]:

> The question at hand, all Members of the Court agree, is whether this case should be bracketed with *Douglas v California*, [], because appointed counsel is sought for initial review before an intermediate appellate court, or with *Ross v Moffitt*, [], because a plea-convicted defendant must file an application for leave to appeal. See post, at 4 (THOMAS, J., dissenting) ("Michigan's system bears some similarity to the state systems at issue in both *Douglas* and *Ross*.").

The majority then decided that *Douglas* was the controlling decision.

The majority reached this decision by determining that regardless whether a defendant had a right to have an error corrected by the Michigan Court of Appeals, the Michigan Court of Appeals was an error correcting court that would look to the merits of the question in determining whether to grant leave or not[23]:

> But the [Michigan Court of Appeals] response to the leave application by any of the specified alternatives – including denial of leave – *necessarily entails some evaluation of the merits of the applicant's claims*.
>
> Michigan urges that review in the Court of Appeals following a plea-based conviction is as "discretionary" as review in the Michigan Supreme Court because both require an application for leave to appeal. Therefore, Michigan maintains, *Ross* is dispositive of this case. The Court in *Ross*, however, recognized that leave-granting determinations by North Carolina's Supreme Court turned on considerations other than the commission of error by a lower court, e.g., the

---

[21] *Halbert*, 125 S Ct at 2590.
[22] *Halbert*, 125 S Ct at 2590.
[23] *Halbert*, 125 S Ct at 2591 (citations omitted; emphasis added).

> involvement of a matter of "significant public interest." Michigan's Supreme Court, too, sits not to correct errors in individual cases, but to decide matters of larger public import. *By contrast, the Michigan Court of Appeals, because it is an error-correction instance, is guided in responding to leave to appeal applications by the merits of the particular defendant's claims, not by the general importance of the questions presented.*

In other words, the United States Supreme Court determined that the right to counsel extended beyond circumstances where a defendant had a right to have an error corrected to situations where the reviewing appellate court would ordinarily operate as an error correcting court. This is an expansion of *Douglas* and, therefore, a new rule of law.

Consequently, now under *Halbert,* an indigent defendant has a right to appointed counsel in his first appeal *even though that appeal is not of right and the defendant has no right to have an error corrected* because the right now attaches where the court reviewing the application will generally engage in some review of the merits of the defendant's application and the court is acting as an error correcting court. This is so because such an application "provides the first, and likely the only, direct review the defendant's conviction and sentence will receive."[24] This ruling extends *Douglas* to a previously unsettled and unresolved set of facts. The gap between *Douglas* and *Ross* has now been filled by *Halbert.*

Before *Halbert*, reasonable jurists could disagree about the application of these two precedents and whether *Douglas* compelled this result.[25] In fact, there was some language of the United States Supreme Court suggesting that *Ross* would govern. In *Pennsylvania v Finley*,[26] the United States Supreme Court examined whether appellate counsel representing a defendant in a

---

[24] *Halbert,* 125 S Ct at 2591.
[25] See *Beard,* 124 S Ct at 2511.
[26] *Pennsylvania v Finley*, 481 US 551, 555; 95 L Ed 2d 539; 107 S Ct 1990 (1987). See also *Wainwright v Torna,* 455 US 586, 587; 71 L Ed 2d 475; 102 S Ct 1300 (1982) ("[*Ross*] held that a criminal defendant does not have a constitutional right to counsel to pursue discretionary state appeals or applications for review in this Court").

collateral attack on the defendant's conviction had an obligation to file an *Anders* brief.[27] In concluding that there was no such obligation, the Court stated that there was no right to appointed counsel in discretionary appeals:

> Our cases establish that the right to counsel extends to the first appeal of right, and no further. Thus, we have rejected suggestions that we establish a right to counsel on discretionary appeals. . . . [A] defendant has no federal constitutional right to counsel when pursuing a discretionary appeal on direct review of his conviction[.]

The suggestion in *Finley* from its plain language is that *Ross* would govern because the Court had previously been unwilling to extend *Douglas* to discretionary appeals.

The state and federal courts that examined the same question before *Halbert* were deeply divided. In a 5-to-2 decision, this Court in *Bulger* concluded that *Ross* governed the result in reviewing a Michigan court rule, which was substantively similar to MCL 770.3a, and affirmed the constitutionality of the Michigan system of appointed counsel.[28] The United States Supreme Court denied the application for certiorari from this decision.[29] In examining the identical issue in *Tesmer v Granholm*,[30] the Sixth Circuit Court of Appeals in an en banc decision split 7-to-4 on the question whether the matter was governed by *Douglas* or *Ross,* the majority determining that the Michigan statute created "unequal access" and therefore violated due process under Douglas, and the dissent concluded that there was meaningful access to the appellate system under *Ross.*[31] Even the *Halbert* Court itself was divided 6-to-3 on the question. The majority determined that

---

[27] *Anders v California,* 386 US 738; 18 L Ed 2d 493; 87 S Ct 1396 (1967).
[28] *Bulger,* 462 Mich at 521-522.
[29] Cert den, 531 US 994; 148 L Ed 2d 459; 121 S Ct 486 (2000).
[30] *Tesmer v Granholm,* 333 F 3d 683 (2003).
[31] *Tesmer,* 333 F3d at 701 (Martin, majority opinion); 712 (Norris, dissenting) ("In this close case, I believe that the Majority Opinion cites to the proper authority and asks all of the right questions en route to its conclusion. With all due respect, however, I believe that the protections provided by the Michigan statute at issue are sufficient to provide indigent defendants with meaningful access to the appellate system as defined by *Ross*").

the State of Michigan is required to provide counsel to guarantee that indigent defendants have meaningful access to the judicial system under *Douglas.*[32] The dissent concluded that the extension of *Douglas* was unwarranted where the Michigan system made "sensible" distinctions between plea-based convictions and defendants convicted at trial.[33]

Although the fact that there was disagreement between jurists on the question alone does not resolve the issue whether the Court announced a new rule in *Halbert*, the United States Supreme Court has reviewed the dissenting opinions of judges on the questions at issue to examine their reasoning to determine their validity.[34] Here, even the majority opinion in *Halbert* conceded that *Douglas* and *Ross* were the cases that "framed" the issue, requiring an analysis of the two opinions' justifications to determine which rationale governed. The analysis at issue and the various opinions themselves evidence the point that the final decision was not "apparent to all reasonable jurists."[35] The issue was not a straightforward application of either *Douglas* or *Ross.*[36] The *Halbert* decision broke new ground and resolved an issue that previously was unaddressed. Consequently, it is a new rule.

2. This new rule is not implicit in the concept of ordered liberty.

Under *Teague,* there are two exceptions to the bar on retroactive application of new rules of constitutional criminal procedure. First, the bar does not apply to rules that prevent forbidding

---

[32] *Halbert,* 125 S Ct at 2594.
[33] *Halbert,* 125 S Ct at 2597.
[34] *Beard,* 124 S Ct at 2512-2513, 2513, n 5.
[35] *Beard,* 124 S Ct at 2511, citing *Lambrix,* 520 US at 527-528.
[36] Similarly, in *Howard v United States,* 374 F3d 1068, 1076 (2004), the Eleventh Circuit Court of Appeals determined that the rule at issue there was a "new" one for *Teague* purposes because the prior precedent the U.S. Supreme Court decisions "extended an existing rule into a new and different context."

certain conduct or prohibiting a category of punishment for a class of defendants because of their status or offense.[37] This exception is not at issue here.

Second, there is no bar for "watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding."[38] The accuracy of the criminal proceeding relates to the accurate determination of guilt or innocence.[39] This second exception is limited in scope and only applies to a small core set of rules.[40]

On a related question, the United States Supreme Court examined the retroactive application of a rule in the context of reviewing a defendant's right to have access to the appellate process generally. In *Goeke v Branch,*[41] the Court examined a collateral attack on a state rule from Missouri that forfeited a defendant's right to appeal where that defendant escaped from custody during the pendency of the appeal, known as the "fugitive-dismissal rule." In *Goeke,* the defendant was convicted of first-degree murder against her husband, fled to a neighboring county when her motion for new trial was pending, and was arrested six days later, all of which occurred in 1989. In 1991, the Missouri Court of Appeals dismissed her appeal on direct review and her appeal of the denial of her motion for new trial based on the State's fugitive-dismissal rule.[42] The defendant did not seek direct review but then challenged the dismissal of her appeal on due process grounds in her collateral attack to the dismissal of her appeal.

The Eighth Circuit Court of Appeals determined that the dismissal of the defendant's appeal was a violation of due process where the preappeal flight had no adverse effect on the

---

[37] *Beard,* 124 S Ct at 2513, citing *Penry v Lynaugh,* 492 US 302, 330; 106 L Ed 2d 256; 109 S Ct 2934 (1989).
[38] *Beard,* 124 S Ct at 2513, citing *Penry,* 492 US at 130 (internal quotes omitted).
[39] *Beard,*124 S Ct at 2513.
[40] *Beard,* 124 S Ct at 2513.
[41] *Goeke v Branch,* 514 US 115; 115 S Ct 1275; 131 L Ed 2d 152 (1995).
[42] *Goeke,* 514 US at 116.

appellate process. It noted that the State's dismissal violated substantive due process and fell into the category of conduct that was "arbitrary," "conscience-shocking," "oppressive in a constitutional sense," or "interferes with fundamental rights."[43]

One of the primary issues on appeal to the United States Supreme Court was whether the Eight Circuit was justified in applying this new rule retroactively. In a per curiam opinion, the United States Supreme Court determined that this rule was not a watershed rule of criminal procedure affecting the accuracy of the fundamental fairness and accuracy of the criminal proceeding because there is no constitutional right to appeal at all[44]:

> [The petitioner] argues that even if *Teague* does apply, the rule announced by the Eighth Circuit falls into *Teague's* exception for watershed rules of criminal procedure implicating the fundamental fairness and accuracy of the criminal proceeding. The new rule here is not among the small core of rules requiring observance of those procedures that are implicit in the concept of ordered liberty. *Because due process does not require a State to provide appellate process at all, a former fugitive's right to appeal cannot be said to be so central to an accurate determination of innocence or guilt, as to fall within this exception to the* Teague *bar.*

Stated differently, the Court determined that the unconstitutional loss of a right to appeal does not implicate the *Teague* exception protecting core constitutional rules because the right to appeal is not a necessary right to ensure the accuracy of a defendant's conviction.

This same analysis applies directly to this case. Here, even though the defendant lost his constitutional right to have an attorney assist him with his application to leave on direct review, the conviction became final before the United States Supreme Court ruled in *Halbert.* Consistent with the reasoning of *Goeke,* this defendant's loss of his right to have an attorney assist with his application for leave from his plea-based conviction cannot equal the significance of the

---

[43] *Goeke*, 514 US at 119.
[44] *Goeke*, 514 US at 120 (citations and internal quotes omitted; emphasis added).

complete loss of a right to appeal. By implication, the loss of the lesser right also cannot implicate the accurate determination of guilt or innocence.

Moreover, this result accords with common sense. As in this case, virtually all of claims from plea-based convictions raise issues that relate to the execution of the plea agreement or to the sentencing, and rarely, if ever, relate to a defendant's guilt or innocence. In Michigan, the plea itself is the conviction and the sentencing is merely a statement about the consequences of that conviction.[45] Once the defendant pleads guilty, the issue of defendant's guilt is no longer at issue. The brief on appeal in support of the people by the Kent County Prosecutor aptly states this argument and the Attorney General shall not belabor the point.

Finally, this Court invited the parties to consider *Howard v United States of America*[46] in ordering briefing on this matter.[47] There the Seventh Circuit Court of Appeals was reviewing the question whether the ruling in *Alabama v Shelton,*[48] that a defendant who receives a suspended sentence is entitled to the appointment of counsel, applies retroactively. The issue was whether this was a new rule as of the time that the petitioner raised this claim and whether the right was implicit in ordered liberty.[49] The Seventh Circuit determined that the rule was a new one because the matter was "susceptible to debate among reasonable minds."[50] That Court went on to hold that the right to counsel was implicit in ordered liberty and must be given retroactive effect[51]:

---

[45] *People v Reyna*, 184 Mich App 626, 633-634; 459 NW2d 75 (1990), citing *People v Funk*, 321 Mich 617, 621; 33 NW2d 95 (1948).
[46] *Howard v United States,* 374 F3d 1068, 1076 (2004).
[47] *People v Houlihan,* ___ Mich ___; ___ NW2d ___ (2005) (order dated September 23, 2005).
[48] *Alabama v Shelton,* 535 US 654; 122 S Ct 1764, 152 L Ed 2d (2002).
[49] *Howard,* 374 F3d at 1070.
[50] *Howard,* 374 F3d at 1074.
[51] *Howard,* 374 F3d at 1078.

> Significantly, the Supreme Court has never distinguished between different contexts in judging whether an extension of the right to counsel should be made retroactive. It appears that for these purposes at least one right to counsel case is indistinguishable from another. See [*Arsenault v. Massachusetts*, 393 US 5, 6, 89 S Ct 35, 36, 21 L Ed 2d 5 (1968).] The Supreme Court has instructed us that the right to representation by counsel is inevitably tied to the accuracy of a conviction. *McConnell v Rhay*, 393 U.S. 2, 3-4, 89 S. Ct. 32, 33-34, 21 L. Ed. 2d 2 (1968).

Based on this analysis, the Seventh Circuit concluded that all extensions of *Gideon v Wainright* (right to counsel)[52] require this conclusion[53]:

> The pre-*Teague* retroactivity decisions dealing with right to counsel indicate that each extension of that groundbreaking decision has itself been treated with the worshipful respect accorded *Gideon* itself. The inference we draw is that it is the sheer importance of the right to counsel that is primary in the analysis, not the incremental extension of that right in the case at hand. At the risk of oversimplification, for purposes of the second *Teague* exception there are new rules, and then there are new *Gideon*-extension rules. The *Shelton* decision fits within the second category.

But the extension of a defendant's right to counsel *before* his conviction is entered is entirely different from the right to counsel *after* the conviction has entered. The above analysis does not address the fact that the Unites States Supreme Court held in *Goeke* that a defendant's right to appeal is not essential to ordered liberty because there is no due process right to appeal. The analysis in *Howard* ultimately is inapposite because it does not address the right to counsel after a conviction has entered. Because this is a new rule that does not meet the *Teague* exceptions, this Court should reject defendant's application. The *Halbert* rule does not apply retroactively to cases that were final before its release.

---

[52] *Gideon v Wainwright*, 372 US 335; 83 S Ct 792; 9 L Ed 2d 799 (1963).
[53] *Howard,* 374 F3d at 1081.

Conclusion and Relief Sought

WHEREFORE, the Attorney General, respectfully request that this Honorable Court grant deny defendant's application for leave.

Respectfully submitted,

Michael A. Cox
Attorney General

Thomas L. Casey (P24215)
Solicitor General
Counsel of Record

Eric Restuccia (P49550)
Assistant Attorney General
Attorneys for Plaintiff-Appellee
P.O. Box 30217
Lansing, MI 48909
Telephone: 517/373-4875

Dated: November 1, 2005